Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-282

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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BETH ANN FARAGHER,
*Petitioner*,
v.
THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
*Respondent*.

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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JONATHAN P. HIATT
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

28 pp

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on the issue of employer Civil Rights Act Title VII[2] liability for supervisor hostile environ-

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

[2] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

ment sexual harassment addressed briefly but left largely unresolved in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69-73 (1986). That issue has, since *Meritor*, proved exceedingly troublesome to the federal courts of appeals. The result has been a plethora of lower court opinions that use a plethora of agency law terms—such as "direct" and "indirect" liability, "respondeat superior" and "apparent authority," "scope of employment" and "constructive knowledge"—in ways that give those terms a plethora of conflicting meanings, with different judge's opinions citing the same sections and subsections of the Restatement of Agency to opposite effect. *See, e.g., Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900, 904 (11th Cir. 1988) ("respondeat superior" liability requires that "the employer knew or should have known of the harassment and failed to take prompt action to remedy the violation"); Pet. App. 55a (panel opinion) (same); Pet. App. 8a (en banc opinion) (an employer can be "vicariously liable" "whether or not the employer knew or should have known about the agent's wrongful act"); Pet. App. 7a-8a (en banc opinion) (characterizing "knew or should have known" liability as "direct" liability); Pet. App. 54a-56a (under agency principles, "knew or should have known" liability is " "indirect", while "the employer is directly liable for sexual harassment when the harasser is acting as the employer's agent").

The apotheosis of this intense judicial inquiry, perhaps, was the en banc consideration of the question (and related employer liability issues) by the United States' Court of Appeals for the Seventh Circuit in *Jansen v. Packaging Corporation of America*, 123 F.3d 490 (7th Cir. 1997). *Jansen* yielded seven thoughtful signed opinions for the eleven judges of that court, differing as to such basic issues as whether state or federal law applies to determine employer liability for supervisor conduct, and whether a threat to use economic power to compel acquiescence to unwelcome sexual behavior is the same or different for employer liability purposes as the actual use of such power.



In the quest for principles to govern the determination of when an employing entity must answer for the creation of sexually discriminatory working conditions affecting its employees, the lower courts have in particular disagreed on the import of this Court's limited consideration of the issue in *Meritor*. *Compare* Pet. App. 9a ("*Meritor* teaches [that] employers are not automatically liable for hostile environment sexual harassment by their supervisors or employees") with *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2nd Cir. 1995) ("In *Meritor*, the Supreme Court declined to announce a definitive rule on employer liability, holding instead that federal courts should be guided by common law principles of agency").

After briefly summarizing the reasons why hostile environment sexual harassment violates Title VII, we therefore re-examine *Meritor*, concluding that the Court in that case described in the most general of terms a method of determining whether an employer is liable for the sexually discriminatory working conditions created by particular actions of a particular supervisory employee in a particular workplace with a particular hierarchical structure. Most notably, *Meritor* dictates that this employer liability question be treated as part of the larger issue of Title VII employer liability for acts by supervisory employees; that while the common law of agency may be informative in developing appropriate employer liability guidelines, the issue is ultimately one of determining Congressional intent in crafting Title VII; and that while a generic employer liability rule for *any and all* supervisory employees is inappropriate, employers *may* in many circumstances be responsible for hostile environment sexual harassment perpetrated by supervisory employees without regard to the knowledge or approval of the harassment by any other employer representative.

Taken together those principles provide more, and different, guidance than the lower courts have in general perceived. And, applying those principles, we submit that the general approach taken by the concurring opinion

in *Meritor* is both sound and—as Justice Stevens recognized in joining both *Meritor* opinions—fully consistent with the Court's opinion therein.

As the *Meritor* concurring opinion notes, because employers act with regard to labor relations only through individual supervisors, as a general matter under Title VII employers are held responsible for unlawful discrimination by supervisors whether or not the supervisor's act is consistent with the employer's official equal employment policies. This is in full accord with the common law of agency, which recognizes that employing entities can be held responsible for actions taken within a supervisor's (or nonsupervisor's) scope of employment even if that action is contrary to the supervisor's directions and consciously unlawful. And, as the *Meritor* concurring opinion also notes, nothing in common law agency concepts supports a distinction for employer liability purposes between sexual discrimination in the form of sexual harassment by supervisory personnel charged with authority to direct employees and to oversee day-to-day working conditions, on the one hand, and sexual discrimination by a supervisor charged with the authority to make decisions with regard to discharge, promotion, or compensation, where the supervisor's decision is borne of an employee's refusal to acquiesce in the supervisor's sexual demands, on the other.

While the common law of agency is clear and uniform in these two regards and therefore provides useful guidance with respect to Congress' probable intent in enacting Title VII, the developed common law is less clear as to a third question—whether activity such as sexual harassment, presumably undertaken by supervisors for personal reasons and not to advance the employing entity's interests, is within the supervisor's scope of employment if undertaken in the course of, or incident to, the supervisor's authorized activities, including giving direction to employees and overseeing working conditions. The common law materials can properly and fairly be read as indicating that there *is* employer responsibility for such



supervisor actions. At the same time this is an area in which the common law is in flux, and therefore inconsistent from jurisdiction to jurisdiction and situation to situation.

As to this particular aspect of agency law, then, the common law guidance is unclear, and the better course is to consider the issue as a matter of Title VII substantive law. So considered, the only conclusion consistent with the language, purposes, and, as far as we are aware, the history of Title VII is that Congress did *not* intend to distinguish for any purpose, including employer liability purposes, between discriminatory actions taken out of purely personal prejudices and predilections, on the one hand, and discriminatory actions taken because of a belief that the action will economically benefit the employer on the other.

## ARGUMENT

1. It is helpful to begin the task of delineating an employing entity's responsibility for sexual harassment under Title VII by recalling the substantive analysis which provides the basis for the conclusion that in certain instances abusive behavior in the workplace directed at employees of one sex because of their sex violates Title VII.

Title VII makes it an "unlawful employment practice" for an employer

> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(a).]

As this Court explained in *Meritor*, "[t]he phrase 'terms, conditions, and privileges' of employment evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." 477 U.S. at 64 *quoting Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978).

As such, the phrase "'is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.'" 477 U.S. at 66, *quoting Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). And, since "a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets," sexually abusive behavior directed at one sex can so "alter the conditions of employment" as to create a discriminatorily "abusive work environment," violative of Title VII. 477 U.S. at 66, *quoting Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) .

In short,

> the very fact that discriminatory conduct [is] so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality. [*Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993).]

Conversely, because Title VII does not outlaw harassing conduct as such, but only "discriminat[ion] against any individual with respect to his . . . conditions of employment, because of such individual's race, color, religion, sex, or national origin," discriminatorily abusive "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." 510 U.S. at 21.

Sexual harassment that reaches the level delineated in the *Meritor/Harris* standard, is, in other words, contrary to the language of, and policies underlying, Title VII for the same reason as would be the assignment of all African-American employees to work in windowless basement offices with poor lighting and inadequate, secondhand furniture, while all white employees, regardless of



position, have the preferable, outside offices with good light, new furnture and windows with views; or the provision of new Pentium-chip computers to all male clerical workers and electric typewriters to women (even with a suitable adjustment in workload); or the requirement that all black employees address the supervisor as "Mister" or "Ms" while white employees are invited to use the supervisor's first name.

In all these instances, the work environment is a discriminatory one, because the disfavored group has to endure disadvantages and distractions not endured by the favored group, and because the discrimination demeans the discriminatees as employees and as human beings, with the foreseeable result of "detract[ing] from employees' job performance, discourag[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers." *Harris*, 510 U.S. at 22.

2. Under Title VII, however, unequal employment conditions based on gender—or race, or religion or national origin—are unlawful only if "an *employer* . . . discriminates." 42 U.S.C. § 2000e-2(a).

*Harris* is a good example of the kind of case as to which there is general agreement that it is the "employer," not someone else, that is responsible for the existence of a discriminatorily abusive work environment. Ms. Teresa Harris, the plaintiff there, worked as a manager for a company whose president, Charles Hardy, "often insulted her because of her gender and often made her the target of unwanted sexual innuendos." 510 U.S. at 19.[3] Although Ms. Harris complained to Mr. Hardy about his behavior, that behavior did not stop. We are not

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[3] The *Harris* opinion does not indicate whether an outside Board of Directors hired Mr. Hardy as company president or whether—as appears more likely—Forklift Systems is a closely held corporation that is in fact if not in legal form the sole proprietorship of Mr. Hardy. The point made in the text is that this distinction could not possibly matter for purposes of Forklift's Title VII liability.

told whether or not Mr. Hardy—or perhaps Forklift's personnel director, if the company had one—had ever promulgated a policy outlawing behavior of the kind to which Ms. Harris was subjected. But surely that would not have mattered, any more than a general policy against race discrimination would have precluded a lawsuit against Forklift had Mr. Hardy assigned offices to African-American employees and white employees on a discriminatory basis, because of a personal prejudice against African-Americans. Rather, because Mr. Hardy was, it appears, in ultimate control of working conditions for Forklift as a whole—as well as, one also presumes, in ultimate control of employee compensation and job security —ascribing the conduct to the employing entity appears unassailable, and this is so whether Mr. Hardy's conduct was based on his views of effective management or on his personal needs, predilections, and prejudices.

In *Meritor*, in contrast, the issue of employer responsibility for the discriminatorily abusive working conditions arose because the individual perpetrating the pervasive harassment was not the president of the company but a vice-president who was the manager of the bank branch at which the plaintiff worked. The branch manager had responsibility for "direct[ing] employees in their work, . . . evaluat[ing] their performances and . . . recommend[ing] personnel actions," including salary increases, bonuses, and promotions, but apparently did not have ultimate authority over compensation, promotion, or discharge. *Vinson v. Taylor*, 753 F.2d 141, 150 (D.C. Cir. 1985).

Thus, the question raised by *Meritor* was whether an employing entity that, like most larger organizations, divides up the unitary supervisory authority exercised by the chief officer of a small, closely held company so that different supervisory persons are responsible for managing different aspects of the employees' terms and conditions of employment in different functional and geographical subdivisions of the entity, can thereby escape or limit its responsibility for the working environments created by



the supervisors vested with primary, day-to-day authority over employee working conditions.

The *Meritor* Court of Appeals—without grounding its decision on the branch manager's power to influence the compensation and status of branch employees or his role as the day-to-day manager of a discrete physical workplace site—held that "employers must answer for the sexual harassment of any subordinate by *any* supervising superior." 753 F.2d at 150 (emphasis added). In so ruling, the *Meritor* Court of Appeals had this to say about "[traditional] principles of respondeat superior as they obtain in the field of torts," and about those principles' office in determining employer Title VII liability:

> Confining liability, as the common law would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees. [Footnote omitted.] While modern courts seem more inclined to treat intentional misconduct on the job as arising out of and in the course of the employment [footnote omitted], and thus as providing a basis for liability under a somewhat expanded theory of respondeat superior, there simply is no need to so confine either the analysis or the solution where Title VII applies. [753 F.2d at 151.]

The *Meritor* Court of Appeals thereupon held that Title VII establishes "[a] higher level of imputed responsibility than respondeat superior imposes." *Id.*

This Court, after considering the *Meritor* Court of Appeals' holding and the positions espoused by the parties and the *amici*, "declined the parties invitation to issue a definitive ruling on employer liability" because of "the state of the record in this case." 477 U.S. at 73. Rather, this Court considered the employer liability question at the most general level, holding that "the Court of Appeals was wrong to *entirely disregard* agency principles and

impose absolute responsibility on employers for the acts of their supervisors, *regardless of the circumstances of a particular case*." *Id.* (emphasis added).

Thus, the major point this Court made in *Meritor* regarding employer responsibility for the creation of a discriminatorily abusive workplace by a supervisory employee, as we understand it, is that the uncertainty within the common law of agency noted by the lower court there does not justify ignoring *entirely* the concepts developed over the years in determining the responsibility of employing entities for the acts of individuals invested with some, but not all, of the entity's authority to set and enforce the terms and conditions on which employees work.

The *Meritor* Court's caution in this regard suggests that careful attention to the particular authority vested in the supervisor in question is important in determining whether the employing entity is responsible for injuries created in the exercise of that authority. For that reason, generic rules such as the one adopted by the *Meritor* Court of Appeals, applicable to *all supervisors*, and without regard to whether or not the harassment occurred in the course of supervision, or at entirely separate times and places, are inappropriate.

At the same time, the *Meritor* Court recognized that the question of employer liability for sexual harassment by supervisory employees cannot be determined in a Title VII vacuum. Rather, that question is merely a subspecies of the question whether, and to what degree, Congress' decision to define "employer to include any 'agent' of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. at 72.

Further, the *Meritor* Court advised that while "common law [agency] principles" can provide some "guidance" in determining those limits, the common law "principles may not be transferable *in all their particulars* to Title VII." 477 U.S. at 72 (emphasis added).



Finally, the *Meritor* Court specifically held that the employing entity *can* be responsible for supervisor hostile environment sexual harassment although no representative above the level of the harassing supervisor has notice of the discriminatorily abusive working conditions created by the supervisor's actions. 477 U.S. at 72 ("absence of notice to an employer does not necessarily insulate that employer from liability").

In a concurring opinion in *Meritor,* moreover, four members of the Court, believing that the employer liability question that the Court "leaves open" was in fact "properly before us," decided that question. The four concurring Justices noted, first, that "the answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer." 477 U.S. at 75 (Marshall, J., concurring). Those justices concluded that where "a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace . . . it is the authority vested in the supervisor by the employer that enables him to commit the wrong." *Id.*, at 77. Under those circumstances, the concurrence maintained, no requirement limiting employer liability to circumstances in which higher managerial personnel have notice of the abusive working environment "can coherently be drawn from the law of agency," *id.*, although "agency principles and the goals of Title VII law" do "make appropriate some limitation on the liability of employers for the acts of supervisors," *id.*

Justice Stevens, perceiving no inconsistency between this analysis and the more general guidelines drawn by the Court and agreeing with the concurrence that the employer liability issue should be addressed, joined both opinions. And, indeed, the analysis of the concurring Justices in *Meritor* is fully faithful to the general principles enunciated by the Court, and summarizes in broad outline the appropriate and—despite all the verbiage in the lower court opinions since *Meritor*—relatively straight

forward standards for determining employer liability for the creation of discriminatorily abusive workplaces by supervisor hostile environment sexual harassment.

3. First, the analysis must begin from a realistic understanding of the problem. As the concurring Justices in *Meritor* noted, except in the relatively unusual case like *Harris*, in which the discriminatee's immediate supervisor and harasser is the company president, "[a]n employer can only act through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of the corporation's board of directors." 477 U.S. at 75. *See also Horn v. Duke Homes Div. Of Windsor Mobile Homes*, 755 F.2d 599, 605 (1985) ("reification of the 'company' invites an ill-advised descent into the world of legal fiction. The 'company' is a legal form; it can 'act' only through its duly-appointed agents."); *Davis v. City of Sioux City*, 115 F.3d 1365, 1371 (8th Cir. 1997) ("A corporate or governmental entity cannot act by itself. Their personification is a legal fiction, and they can effect their goals only through their agents.")

The question, then, cannot be whether the employing entity can ever be responsible under Title VII for discriminatory actions taken by individuals employed to direct the actions of, and make decisions regarding, other employees. Given the realities just noted, if there were no such responsibility, the statute would become a dead letter. Indeed, while disparate treatment cases under Title VII typically turn on whether a particular action adversely affecting an employee was taken "because of" the employee's race or sex or religion or national origin, the relevant mindset has always been understood to be the mindset of the individuals responsible for the decisions, not the mindset of an abstraction called the "employer." *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing the kind of discriminatory action prohibited by Title VII). It is for that reason that, as the concurring opinion in *Meritor* noted, "when a supervisor discriminatorily fires or



refuses to promote a black employee, that act is, without more, considered the act of the employer." 477 U.S. at 75, citing cases.

To put this another way, the key consideration for Title VII liability purposes is not the action taken, but the basis on which the action is taken. Title VII does not set standards for hiring, discharge, compensation, promotion, or any other aspect of workplace decision-making, other than the single standard that the decision-making process cannot turn on race, sex, religion, or national origin. And, in the typical disparate treatment Title VII case, the focus is on the particular intent of the responsible employer representatives, *not* on the overall employer policy regarding equal employment opportunity. Indeed, in most modern workplaces, discriminatory acts by even the highest managers are *inconsistent* with the employing entity's official policy.

While the result in such cases is not typically discussed in terms of the common law of agency, the unspoken premise is that as long as the employer representative is taking an action he or she is authorized to take—firing an employee, or determining her salary, or refusing her a promotion—the action is within the scope of that supervisor's delegated authority on behalf of the employing entity, and the supervisor therefore *is* the employer for Title VII liability purposes.

In contrast, on the view of the common law of agency discussed by the *Meritor* Court of Appeals and adopted by the court below and applied in this case, a discriminatory discharge or discriminatory failure to promote case would turn not on the intent of the employer representative who actually took the action, but on the intent of the individual or individuals at the highest level of management in setting policy on the kind of decision in question. To paraphrase *Vinson v. Taylor*, 753 F.2d at 151, on that view of the common law of agency concerning employer liability for actions taken by supervisors

within the scope of their employment, "[c]onfining liability, as the common law would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow [discriminatory economic decisions affecting employees]." *See* also Pet. App. 9a ("illegal [discriminatory discharges or other economic decisions] is an illegitimate corporate activity, beyond the scope of the supervisor's employment."); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (same).

But on the general—and critical—point whether an employing entity can be liable for acts taken by its supervisory employees that are against official company policy, the "guidance" (*Meritor*, 477 U.S. at 72) provided by common law doctrine is quite the *contrary* to that suggested by the *Meritor* Court of Appeals and applied by the Court of Appeal in this case. Since the nineteenth century, the developed doctrine governing the liability of employing entities to third parties for torts of the entity's employees has recognized that the concept of delegated authority cannot be defined so narrowly that the employing entity is insulated from responsibility whenever its employees fail to live up to the entity's official rules of conduct. For any such delegated authority concept would absolve enterprises of the costs of injuries that are fully foreseeable risks of running an enterprise, and that should be borne by the entity rather than by the injured person:

> It is probably true that before the nineteenth century the master was not normally responsible for the uncommanded acts of the servant . . . However, with the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working . . . for [its] benefit. [Restatement of the Law of



> Agency 2d (1958) ("Restatement"), § 219, Comment (a)].

Consequently, the clear understanding of modern agency law is that "An action, although forbidden, or done in a forbidden manner, may be within the scope of employment," and that "An act may be within the scope of employment although consciously criminal or tortious." Restatement §§ 230, 231. Indeed, the very concept of "scope of employment" has little content *other* than as a "bare formula to cover the unordered and unauthorized acts for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not." Prosser & Keeton, *The Law of Torts*, Fifth Edition, 1984, at 502.

The concurring opinion in *Meritor*, then, is quite correct in its understanding that the most relevant guidance that "can coherently be drawn from the law of agency" (477 U.S. at 77), like the guidance that can be drawn from Title VII itself, *supports*, as a general matter, responsibility by employing entities for discriminatory acts by management representatives without regard to whether those acts violate official policy, or whether higher levels of management are aware of, or ratify the discrimination.

Similarly, there is nothing in agency concepts that justifies a distinciton between sexual discrimination in the form of sexual harassment by supervisory personnel charged with the authority to direct employees and to oversee day-to-day working conditions and sexual discrimination by a supervisor charged with the authority to make final decisions with regard to discharge, promotion, or compensation, where the supervisor's decision is borne of an employee's refusal to acquiesce in the supervisor's sexual demands. *Compare, e.g., Jansen, supra*, 123 F.3d at 512 (Posner, J., concurring) (distinguishing, albeit not on general agency law grounds, employer liability for completed "company acts" such as transfers, raises, and promotion, from liability for supervisory actions that do not have such a direct economic impact.)

The "scope of employment" concept is a general one that applies in the same way to each of the various kinds of authority that an employing entity can grant to its supervisors to control some basic aspect of the work lives of the entity's employees. Put another way, agency law does not cut off employer responsibility for the acts of supervisory employees at some level in the management hierarchy or limit that responsibility to supervisory employees with authority over a specific aspect of employees' work lives. Rather, traditional agency law holds the employer liable for actions taken within the area that is delegated, whatever that area may be.[4] Any other approach, indeed, would absolve the entity entirely of responsibility for actions taken by those assigned authority to set or enforce rules governing the day-to-day working environment. *Cf.* 29 U.S.C. § 152(11) (supervisors for purposes of the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, include individuals with any one of a range of "authority, in the interest of the employer," including, co-equally, the authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or *responsibility to direct them or to adjust their grievances*, or effectively to recommend such action. . . ."

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[4] The reason that employers are not necessarily responsible for the harassing acts of an employee's co-employees is not that co-employees are not covered by the "scope of employment" concept, but that a co-employee's scope of employment does *not* include authority to determine the working conditions of fellow employees. With regard to the work rank-and-file employees do for the employing entity, the employer is liable for their actions. In this case, for example, Ms. Faragher and the other lifeguards did not determine the working conditions on the waterfront, but were responsible for swimmer safety. The City of Boca Raton was therefore answerable for the lifeguards' actions in carrying out their water safety duties, but not, without more (such as knowledge by those who were responsible for working conditions of pervasive discriminatory harassment by co-employees) for the conduct of the lifeguards vis-a-vis each other.



Consequently where—as is true in this case with regard to Mr. Terry, the on-site manager of the employing entity's marine safety operation and, it appears, was true in *Meritor* with regard to the bank branch manager—the employer proceeds by assigning an on-site supervisor, with broad authority over the manner in which work is performed and with a general discretion as to how directions regarding that work are to be conveyed, that individual *is* the representative of the employer for those purposes. And, where the asserted Title VII wrong is the "creat[ion of] a work environment abusive to employees, because of their race, gender, religion or national origin [that] offends Title VII's broad rule of workplace equality" (*Harris*, 114 S. Ct. at 371), actions taken by a supervisory employer representative, with general responsibility to set or to impliment day-to-day work rules and working conditions, *are* actions taken by an individual with authority over the *particular* managerial area that gives rise to the violation.

The governing legal standard, and the proper legal analysis, is the same as the one that leads to the all-but-universal rule that it is the employer that is responsible for a style of supervision by a department supervisor that meets tort standards for intentional infliction of emotional distress, and for a style of supervision that segregates the workplace on the basis of race, despite clear official employer policy to the contrary. Under that standard, creation of a sexually discriminatory abusive work environment by supervisors "charged with the day-to-day supervision of the work environment . . . should [not] have different consequences than abuse of [authority over economic terms of employment]." *Meritor*, 477 U.S. at 76 (Marshall, J., concurring).[5]

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[5] Indeed, for reasons of workplace discipline and productivity, the employing entity ordinarily encourages employees working under a site manager or department head to regard that on-site person as the primary employer representative even if economic decisions are made elsewhere. For it is to the employer's benefit to structure the

4. The common law of agency "scope of employment" concept, then, provides general "guidance" indicating that the kinds of distinctions some of the courts of appeals have drawn to distinguish cases concerning supervisory hostile environment sexual harassment from other kinds of discrimination unlawful under Title VII cannot stand analytical scrutiny. At the same time, the background "scope of employment" law ceases to be particularly instructive with regard to one other aspect of the issue before the Court—whether, as the Court of Appeals in this case maintained, an employer is absolved from responsibility for supervisor actions otherwise within the supervisor's scope of employment where the supervisor "has no intention to perform any service for his employer, but instead seeks only to further some personal end." Pet. App. 10a; *see* Restatement § 228 ("[C]onduct of a servant is within the scope of employment . . . only if . . . it is actuated, at least in part, by a purpose to serve the master").

It is far from clear whether the drafters of the Restatement would view acts of a supervisor—invested with authority to establish and oversee working conditions—which create a discriminatorily abusive working environment as acts that fall outside the scope of employment because actuated by a purely personal motive. Quite possibly, the close connection between the authority entrusted to such a supervisory employee and the pervasive imposition of abusive treatment on employees *while carrying out that supervisory responsibility* would bring the abusive speech or action within the "dual purpose" rule—that "[c]onduct may be within the scope of employment, although done in part to serve the purposes of the servant . . ." Restatement § 236; *see* illustration (2) (where "A servant of P., to accommodate a friend who is riding with him, drives a master's truck at an excessive rate of speed[;] . . .

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workplace so that the employees will obey the directives of their supervisor as those of the employer, and will accept the decisions of the supervisor as those of the employer.



[s]uch driving is within the scope of employment"); Restatement § 235 (indicating that acts are within the scope of employment if "perform[ed] . . . as a part of or incident to a service on account of which [the employee] is employed").

Given the dual purpose rule, sexual harassment such as that in this case is properly and fairly characterized as the supervisors' manner of carrying out acts within their authority, albeit a manner chosen out of, and to meet, the supervisor's sense of personal satisfaction. See Pet. App. 27a-29a (Barkett, J., dissenting), and cases cited (because the supervisors in this case "were charged with creating and maintaining a productive, safe work environment, while directing their employees in the performance of their duties" and "[i]t is while they were engaged in their responsibilities that the harassment of Faragher occurred," common law of agency scope of employment concepts support holding the employer liable); *Jansen, supra,* 123 F.3d at 574 (Wood, J., dissenting) (in determining "whether the supervisor, is acting at least in part for the purpose of serving the employer," the "conduct of the supervisor that must be assessed is not the act of harassment in isolation, but instead his broader course of action"; sexually harassing acts are therefore within the scope of employment as long as "the supervisor . . . committed the acts of harassment as he exercised the authority . . . the employer conferred on him").

Having said that, it is also proper and fair to add that the common law of agency is in flux on the closely analogous question of employer tort liability for acts taken by employees to satisfy personal predilections or urges while otherwise performing authorized services for the employer, and that the common law outcomes in cases raising variants on that question vary from jurisdiction to jurisdiction and situation to situation. Thus, for example, while in the past smoking while working was regarded as outside the scope of employment, "more recently . . . smoking on the job has quite generally been held to be within the scope of

employment," so that employers are now often held liable for injuries caused by employees smoking while working. Prosser & Keeton, *supra*, at 504. Similarly, while the older cases held that "where the servant, for strictly personal reasons and not in furtherance of his employment, loses his temper and attacks the plaintiff in a quarrel which arises out of the employment," the assault is outside the scope of employment because not in furtherance of the employer's interest, the more recent cases "allow recovery on the ground that the employment has provided a peculiar opportunity and even incentive for such loss of temper." *Id.* at 507.[6]

More importantly, even if the common law on these somewhat analogous issues were clearer than it is, the *particular federal statutory question here*—which, stated generically, is whether employers are to be held responsible under Title VII for discriminatory actions taken by supervisory employees where the discrimination furthers the supervisors own interests only and not those of the employer—is one as to which "common law principles may not be transferable in all their particulars to Title VII." *Meritor*, 477 U.S. at 77.

It is beyond doubt that many supervisors who discriminate on the basis of sex, race, religion or national origin have no thought that by so doing, they are serving their employer. Rather, the prejudices underlying their behavior are often their own, and reflect personal animus or preference. Yet, nothing in the language or history of Title VII, so far as we are aware, suggests that the statute is directed only at economically useful discrimination, and not at discrimination that is the result of purely personal prejudice, whether that prejudice be that

[6] It is our understanding that the American Law Institute is currently in the process of drafting a Restatement Third of Agency, presumably because there has been sufficient development in the law of agency as a whole since the last revision to merit that major undertaking.



of the abstraction we call the employer or of some individual endowed by the employing entity with authority to govern the workplace in some regard.

This point is made clearer, as it applies to the sexual harassment situation particularly, by returning to the comparison between the situations in *Harris* and in *Meritor* with which we began. There is no doubt, we are sure, that in *Harris*, Forklift would be responsible for the discriminatorily abusive working conditions created by Mr. Harris' actions as president of the company whether his disdain for women was purely personal or reflected his considered conclusion that women deserve a second-class status in the workplace because they are less productive employees than men. And, we can conceive of no reason within the purpose of Title VII for applying a different rule regarding the application of Title VII to personally-motivated discrimination if Mr. Harris, as the manager of a branch of Forklift in a separate location, rather than as the company president, took exactly the same actions with exactly the same impact on women workers.[7]

[7] The dissents in the Court of Appeals in this case make a separate foray into the common law of agency, invoking the common law principle that an employing entity is liable for the acts of its agents if the agent was aided in causing the injury by the fact of the agency, to reach the result that the employer is responsible for the supervisor employee hostile workplace sexual harassment alleged here. Restatement § 219(2)(d); Pet. App. 29a (Barkett, J., dissenting); Pet. App. 40a (Anderson, J., dissenting). But, once again, the common law rules in this regard are somewhat unclear, and open to conflicting interpretations. *Compare Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1445 (10th Cir. 1997) with *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir.), *cert. denied*, —— U.S. ——, 116 S. Ct. 569 (1995). We therefere suggest that the analysis in text, melding those common law of agency concepts that *are* clear and indisputable with Title VII substantive priciples states a more useful approach.

If, however, the Court does analyze the issue here, as did the Court of Appeals in this case, on a Restatement § 219(d)(d) theory, then the Court should reject the untenable distinction drawn by the Court of Appeals between explicit and implicit reliance on the su-

In short, just as "Victorian common law does not define the limits of the antitrust private action," even though "[w]e look to the general principles of the common law for guidance in deciding the scope of the antitrust cause of action," (*American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 568-69 n.6 (1982)), so Victorian common law cannot answer the basic Title VII question whether liability lies where management representatives' discriminatory behavior is motivated by personal reasons rather than economic reasons. And, as the foregoing shows, the congressional intent that led to the

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pervisor's ability to affect the discriminatee's economic status or job security. Pet. App. 13a (the harassing supervisors were not "aided in accomplishing the harassment by the existence of their agency relationship with the City" because "no person threatened to fire or demote Faragher for refusing the accomodate [the supervisor's] harassing overtures.")

As the National Labor Relations Board and the courts have recognized in applying the National Labor Relations Act, management representatives' conduct toward, and statements to, employees that would be taken as innocent outside the employment relationship take on a coercive cast by reason of that relationship. That is because the supervisor and the employees are necessarily aware of the supervisor's authority to disadvantage the employee, even if that authority is not expressly invoked.

For example, because "[employees] know the consequences of incurring the employer's strong displeausre," (*International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 78 (1940), verbal presentations that "to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart" (*NLRB v. The Federbush Co.*, 121 F.2d 954, 957 (2nd Cir. 1941) (L. Hand, J.)). *See also NLRB v. Kaiser Agricultural Chemicals, Div. Of Kaiser A. & C. Corp.*, 473 F.2d 374, 381 (5th Cir. 1973) ("The question is not only what the employer intended to imply but what the employees could reasonably have inferred); *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 617-18 (1969) (in determining whether a violation of employees' rights has occurred, courts "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.").



enactment of Title VII, dictates that no line between personally and economically motivated discriminatory actions can be drawn under the statute, whether for the purpose of determining liability for the actions of supervisors charged with governance of the working environment or for any other purpose.[8]

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[8] Under the analysis presented in text, the existence of an employer policy forbidding sexual harassment by supervisors and providing for a means of complaining about any such harassment to higher management would no more absolve the employing entity of all responsibility for the creation of a discriminatorily abusive work environment than a similar policy would avoid liability for a discriminatory discharge or other violation of Title VII by a mid-level supervisor. At the same time, such a policy—if, unlike the policy in this case—communicated effectively and with emphasis, providing for protection from retaliation, and producing effective, prompt responses, can protect employing entities from liability for hostile environment sexual harassment by supervisors in four ways:

First, since such harassment violates Title VII only if sufficiently pervasive as to alter the employee's working conditions, an effective policy can encourage employees to report harassment before it reaches the actionable level.

Second, as the concurrence in *Meritor* noted, the existence of an effective policy would be relevant to a constructive discharge claim: "Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court might be reluctant to find constructive termination," where the employee quit rather than try to remedy the discrimination internally. 477 U.S. at 78 (Marshall, J, concurring).

Third, the existence of an effective policy for reporting and remedying sexual harassment might be relevant to compensatory damages, on a theory akin to the mitigation requirement. In that instance, however, once liability was established, the burden would presumably be on the employer to show that the compensatory damages suffered were higher than they would have been had the employee used an available reporting system, and that there were no explicit or implicit deterrents to using the system.

Finally, the existence of an effective internal sexual harassment policy would certainly be relevant in assessing punitive damages.

## CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

JONATHAN P. HIATT
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD *
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record